STATE OF MICHIGAN

COURT OF APPEALS

JOHN SCHUMITSCH and THERESA SCHUMITSCH, Plaintiffs-Appellants, v PIONEER STATE MUTUAL INSURANCE COMPANY and SAM HERON INSURANCE AGENCY, Defendants-Appellees.	UNPUBLISHED March 20, 2014 No. 313046 Genesee Circuit Court LC No. 11-097109-CK

Before: SERVITTO, P.J., and SAWYER and BOONSTRA, JJ.

PER CURIAM.

Plaintiffs appeal by leave granted a circuit court order granting summary disposition in favor of defendant Sam Heron Insurance Agency (the agency) pursuant to MCR 2.116(C)(10). The trial court subsequently entered an order granting summary disposition in favor of defendant Pioneer State Mutual Insurance Company (Pioneer) pursuant to MCR 2.116(10), and denied plaintiffs' motion for reconsideration. We affirm in part, reverse in part, and remand for further proceedings.

This action arises from losses that plaintiffs sustained when a pole barn on their property burned on March 30, 2011. Plaintiffs were insured under a "farmowners" policy issued by Pioneer, which plaintiffs first purchased in 1994 through the agency. It is undisputed that plaintiffs did not pay for the specific coverage for farm structures and farm personal property, and that the coverage that was in effect excluded property used for farming. Essentially, plaintiffs allege that they were led to believe from conversations with the agency and the type of policy they purchased that there was coverage for the barn. Plaintiffs admitted that they never read the policy, which the trial court concluded was fatal to their claims against Pioneer and the agency. Accordingly, the court granted summary disposition in favor of both defendants pursuant to MCR 2.116(C)(10).

Summary disposition may be granted under MCR 2.116(C)(10) when "there is no genuine issue of material fact, and the moving party is entitled to judgment . . . as a matter of law." This Court reviews a trial court's decision on a motion for summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

Plaintiffs' appeal focuses on their claims against the agency. In this respect, however, plaintiffs' discussion of the concepts of mutual mistake and reformation of contracts is misguided because plaintiffs' complaint does not refer to mutual mistake and it does not seek reformation of the insurance policy. Moreover, count II, the only count applicable to the agency, is labeled "Misrepresentation/Negligence"; it is not a contract-based claim.

We agree with the trial court that a claim for misrepresentation is not viable in light of plaintiffs' admitted failure to read the insurance policy. Both innocent misrepresentation and fraud require that a plaintiff establish reasonable reliance on the alleged material misrepresentation. *Zaremba Equip, Inc v Harco Nat'l Ins Co,* 280 Mich App 16, 39; 761 NW2d 151 (2008) (*Zaremba I*). A party cannot prevail on a fraud or misrepresentation claim premised on misrepresentations that are contrary to the unambiguous terms of an insurance policy. *Id*. at 40; *Zaremba Equip, Inc v Harco Nat'l Ins Co,* 302 Mich App 7, 16; 837 NW2d 686 (2013) (*Zaremba II*). Although there is no common-law duty to investigate, "[i]gnoring information that contradicts a misrepresentation is considerably different than failing to affirmatively and actively investigate a representation." *Titan Ins Co v Hyten,* 491 Mich 547, 555-556 n 4; 817 NW2d 562 (2012). In light of plaintiffs' admitted failure to read the policy, there is no genuine issue of material fact regarding the element of reasonable reliance, and the agency is therefore entitled to judgment as a matter of law with respect to plaintiffs' claim for misrepresentation.

However, *Zaremba I* and *Zaremba II* indicate that plaintiffs' failure to read the policy is not a bar to their recovery under a negligence theory of relief. In *Harts v Farmers Ins Exch*, 461 Mich 1, 8; 597 NW2d 47 (1999), the Court explained that "under the common law, an insurance agent whose principal is the insurance company owes no duty to advise a potential insured about any coverage." The agent presents the products offered by the principal and takes orders. *Id*. at 8. Although the "limited role may seem unusually narrow," it is "consistent with an insured's obligation to read the insurance policy and raise questions concerning coverage within a reasonable time after the policy has been issued." *Id*. at 8 n 4, citing *Parmet Homes, Inc v Republic Ins Co*, 111 Mich App 140, 144; 314 NW2d 453 (1981). The Court then recognized that the Legislature has distinguished between insurance agents and insurance counselors, with the former being essentially order takers. *Id*. at 8-9. However, the Court explained that the "general no-duty-to-advise rule, where the agent functions as simply an order taker for the insurance company, is subject to change when an event occurs that alters the relationship between the agent and the insured." *Id*. at 9-10. The alteration, described as a "special relationship," gives rise to a duty to advise on the part of the agent. *Id.* at 10. The Court explained:

> [T]he general rule of no duty changes when (1) the agent misrepresents the nature or extent of the coverage offered or provided, (2) an ambiguous request is made that requires a clarification, (3) an inquiry is made that may require advice and the agent, though he need not, gives advice that is inaccurate, or (4) the agent assumes an additional duty by either express agreement with or promise to the insured. [*Id*.]

Where the agent owes a duty to the insured, the insured's failure to read the policy is relevant to the issue of comparative negligence to be weighed against the negligence of the agent. *Zaremba I,* 280 Mich App 29-36; *Zaremba II,* 302 Mich App at 16, 19-20.

In this case, plaintiffs presented evidence that plaintiff Theresa Schumitsch inquired of the agency on two occasions whether the barns were covered, and she was assured that they were. The circumstances support an argument for the special relationship under *Harts.* Contrary to the trial court's ruling, plaintiffs' failure to read the policy does not preclude their negligence claim. Rather, the failure to read the policy is a matter of comparative negligence. *Zaremba I,* 280 Mich App at 33; *Zaremba II*, 302 Mich App at 16. The trial court erred in granting summary disposition to the agency with respect to the negligence claim on the ground that plaintiffs failed to read the policy.

Plaintiffs do not offer any argument that specifically pertains to Pioneer. Although plaintiffs' brief sometimes refers to "defendants" collectively and names both defendants, plaintiffs' substantive arguments concerning the communications they had concerning the policy were with the agency, not Pioneer. Because plaintiffs fail to offer any meaningful argument or analysis in support of a claim against Pioneer, they have abandoned any claim that the trial court erred in granting summary disposition in favor of Pioneer. *Reed v Reed*, 265 Mich App 131, 163; 693 NW2d 825 (2005).

Affirmed in part, reversed in part, and remanded for further proceedings not inconsistent with this opinion. We do not retain jurisdiction.

/s/ Deborah A. Servitto
/s/ David H. Sawyer
/s/ Mark T. Boonstra